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No. 07-696

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In The

Supreme Court of the United States

JOHN A. HICKEY,

Petitioner,

v.

A. LEE BIANCUR; LINDA BIANCUR;
LA RUE W. BEAN; ALLEN MURPHY;
ROBERT SCHLENZIG; GAIL SCHLENZIG,
On Behalf Of Themselves and
All Others Similarly Situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is Review of the Merits of an Earlier Appellate Decision From Which Petitioner Did Not Petition This Court for Review in a Subsequent Appellate Decision Affirming a Denial of a Rule 60(b) Motion for Relief From Judgment Permissible?

2. Did the Ninth Circuit Err in Affirming the District Court's Denial of Petitioner's Rule 60(b) for Relief from Judgment?

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OPINIONS BELOW

The unpublished February 22, 2007 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 221 Fed. Appx. 546; 2007 U.S. App. LEXIS 4071, No. 01-17238. The petition for panel rehearing and rehearing en banc before the Ninth Circuit was denied on May 17, 2007.

STATEMENT OF THE CASE[1]

I. Introduction

Plaintiffs in the original action, and respondents in this action ("Respondents"), filed a class-action complaint against Petitioner and other defendants alleging a scheme to defraud on June 27, 1995. ER at 1-75. The scheme was in relationship to two California limited real-estate partnerships set up by Petitioner and his co-defendants, through which defrauded investors lost the value of their investments. *Id.* By order dated January 3, 1997 and amended on February 20, 1997, the Court certified the action to proceed as a class action. ER at 258-62.

In January 2000, Respondents moved for entry of default judgment against Petitioner on behalf of the certified Classes. ER at 318-29. In opposition to the entry of default judgment, Petitioner first made an appearance in the action. He challenged the

[1] References to "ER" are to the Excerpts of Record.

sufficiency of service of process three-and-one-half years earlier. ER at 517. The District Court concluded that Petitioner was properly served. ER at 520. The District Court entered default judgment, ordering Petitioner to pay damages to the Classes. ER at 513. Judgment was entered on June 28, 2000. ER at 514-25. In its default order, the Court noted that even if one of the grounds asserted by Petitioner were sufficient to set aside the default, the court would still deny his motion, finding that Petitioner's three-and-one-half year delay to contest the default was an "unreasonable delay characteristic of a complete lack of diligence." ER at 523.

II. Petitioner's First Appeal

On July 27, 2000, Petitioner filed a notice of appeal from the default judgment. Petitioner made substantially the same arguments he makes now in his Petition for a Writ of Certiorari ("Petition"). In its April 5, 2002 Memorandum Disposition, the Ninth Circuit affirmed the District Court's entry of default judgment finding that "[t]he district court did not abuse its discretion when it declined to lift the default on the asserted grounds that service of process had been delayed without good cause shown." *Biancur v. Hickey*, No. 00-16435, 2002 U.S. App. LEXIS 6441, at *2 (9th Cir. April 5, 2002); ER at 538. The panel found that Petitioner "advances no meritorious defense to any of the claims in the complaint and that his motions were hardly timely." *Id.* at *4. On May 5, 2004 the same three-member panel denied Petitioner's

motion for panel rehearing and for rehearing en banc. ER at 628. Petitioner did not file a petition for a writ of certiorari from the denial of his first and direct appeal.

III. Petitioner's Second Challenge to the Default Judgment and Second Appeal

On June 28, 2001, during the pendency of his first appeal, Petitioner filed a motion for relief for judgment with the District Court pursuant to Federal Rule of Civil Procedure 60(b). ER at 542. In his motion, Petitioner again asserted that the default judgment was entered in error. *Id.* Petitioner incorporated by reference previous pleadings and oral argument, but offered no new reasons or argument in support of his motion. On October 2, 2001, the District Court denied the motion to set aside the judgment in a stipulated order. ER at 568-69.

Petitioner then appealed the decision denying the Rule 60(b) motion. Petitioner raised the same arguments that he raised in his previous appeal. On February 22, 2007, the court affirmed the district court's denial of Petitioner's motion. *Biancur v. Hickey*, No. 01-17238, 2007 U.S. App. LEXIS 4071 (9th Cir. Feb. 22, 2007). The Court noted that Petitioner "filed a brief that is nearly identical to the brief filed in his first appeal: Not only are his arguments

the same, but the language is nearly identical." *Id.* at **2-3.[2]

On April 23, 2007, Petitioner filed a petition for panel rehearing and rehearing en banc. On May 17, 2007, the Ninth Circuit denied the petition.

On August 2, 2007, Petitioner filed an application with this Court to extend the time to file a petition for a writ of certiorari. On August 8, 2007, Petitioner's application was granted. On September 14, 2007, Petitioner filed the Petition for a Writ of Certiorari to which this opposition responds.

SUMMARY OF ARGUMENT

Simply put, Petitioner raises no "compelling reasons" that merits this Court's review. SUP. CT. R. 10. Petitioner has never contested the factual allegations against him, involving a multi-million dollar fraud and losses sustained by unsuspecting investors in his real-estate scheme. Further, he raises factual issues from a previous appeal that are not reviewable in his current Petition.

The scope of review on a Rule 60(b) motion is narrowly focused on a basis to relieve a party of a judgment. The Ninth Circuit properly applied law of

[2] Respondents supplied a chart to the Ninth Circuit comparing the opening briefs of Petitioner in both the first and second appeal. That chart is attached as Appendix A.

the case because Petitioner raised the same arguments already present in his earlier appeal. He raised no new arguments, new evidence, or intervening change in law.

ARGUMENT

I. Petitioner Cannot Challenge the Underlying April 5, 2002 Court of Appeals Decision Because He Did Not Timely File a Petition For Writ of Certiorari from that Decision

The majority of Petitioner's arguments address factual issues that were addressed on the merits in the April 5, 2002 Ninth Circuit decision affirming the district court's entry of a default judgment. *See* Petition at 14-20. Petitioner did not file a petition for writ of certiorari from the April 5, 2002 Ninth Circuit decision, so review of that decision would be untimely. *See, e.g.,* 28 U.S.C. § 2101(c); SUP. CT. R. 13.1-13.3

Moreover, a Rule 60(b) motion is not a vehicle to rehash issues and arguments made in an earlier appeal. *Polites v. U.S.*, 364 U.S. 426 (1960) (upon review of a denial of Rule 60(b) motion, this Court does not directly review earlier judgment). Denial of a Rule 60(b) motion brings up for review only the propriety of that order itself. *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 263 (1978) (superseded on other grounds by statute as noted in *Ukawabutu v. Morton*, 997 F. Supp. 605, 608 (D.N.J. 1998)); *Elsken*

v. Network Multi-Family Sec. Corp., 49 F.3d 1470, 1476 (10th Cir. 1995); *Harman v. Harper*, 7 F.3d 1455, 1458 (9th Cir. 1993); *Burnside v. Eastern Airlines, Inc.*, 519 F.2d 1127, 1128 (5th Cir. 1975); *Daily Mirror, Inc. v. N.Y. News, Inc.*, 533 F.2d 53, 56 (2d Cir. 1976), *cert. denied*, 429 U.S. 862 (1976); *Pagan v. American Airlines, Inc.*, 534 F.2d 990, 992-93 (1st Cir. 1976).

Only the second February 22, 2007 decision of the Ninth Circuit may properly be reviewed. As a result, Petitioner may only challenge the Ninth Circuit's affirmance of the District Court's denial of Petitioner's Rule 60(b) motion.

II. The Ninth Circuit's February 22, 2007 Decision Affirming the Denial of Petitioner's Rule 60(b) Motion Was Proper

The Ninth Circuit properly concluded that the District Court did not abuse its discretion in denying Petitioner's Rule 60(b) motion. *See Villareal v. Braswell Motor Freight Lines, Inc.*, 545 F.2d 978, 979 (5th Cir. 1977) ("Motions under Rule 60(b) of the Federal Rules of Civil Procedure are addressed to the sound discretion of the court and the ruling will be reversed on appeal only upon a showing of abuse of that discretion"). Petitioner raised the same arguments on his Rule 60(b) motion that he had in his direct challenge to the default judgment. In fact, his Rule 60(b) motion simply incorporated by reference his previously-filed pleadings, declarations, and memoranda. ER at 544. During the hearing on his motion,

the District Court itself noted that there was "nothing new here." ER at 566. In his opening brief to the Ninth Circuit appealing the denial of the Rule 60(b) motion, Petitioner raised the identical arguments that Petitioner had previously raised, and the Ninth Circuit had rejected, in his direct appeal. *See* Appendix A.

Since Petitioner raised the exact same arguments in his appeal of the Rule 60(b) denial that he had in his direct appeal, the Ninth Circuit properly applied the law of the case. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817-18 (1988) (internal quotation and citation omitted). The Ninth Circuit noted that Petitioner "offers nothing more than the very same arguments – couched in the very same language – that were rejected by the previous panel." *Biancur*, 2007 U.S. App. LEXIS 4071, at **4. Petitioner did not claim any extraordinary circumstances to justify deviating from the previous panel's decisions on his arguments. *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996); *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (finding that panel erroneously deviated from its prior decision where no extraordinary circumstances applied).

Petitioner argued that the law of the case should not be applied, but only as an afterthought in a motion for reconsideration.[3] Petitioner, however, identifies no

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[3] Petitioner did not file a reply brief in his second appeal. He raised law of the case in a "Motion to Reconsider Order Granting Appellees' Motion to Submit on the Briefs" filed over two months after the deadline for a reply brief.

new facts; he simply asserts that his Rule 60(b) motion "focuses on different facts." Petition at 25.

Petitioner asserts changes in the law which are inapposite. New Federal Rule of Appellate Procedure 32.1 and the cases he cites have no bearing on the case. *Partington v. Am. Int'l Specialty Lines*, 443 F.3d 334 (4th Cir. 2006), decided on March 30, 2006, and *Davis v. Hutchins*, 321 F.3d 641 (7th Cir. 2003), decided on February 26, 2003, were both decided well before Petitioner filed his opening brief in his second appeal on August 4, 2006. Yet Petitioner did not mention them. Further, the two cases have absolutely no bearing on the case here because they are about class certification. In the underlying action, Petitioner did not challenge class certification. ER at 258-62.

III. Even if This Court Were To Consider the Merits, Petitioner Has Not Given a Single "Compelling Reason" for This Court To Hear This Case

Petitioner does not claim that the Ninth Circuit decision conflicts with a decision in another circuit; or that it decided an important federal question in a way that conflicts with a state supreme court decision; or that the decision raises a federal question that needs to be settled by this Court. SUP. CT. R. 10; *see Devlin v. Scardelletti*, 536 U.S. 1, 6 (2002); *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (certiorari denied based on absence of direct conflict among circuits on constitutionality of supper prayer at state military college). Nor does Petitioner claim that the Ninth Circuit "has

so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10. Petitioner simply disagrees with the unanimous decisions and factual findings of the District Court and the Ninth Circuit. That is not a sufficient reason for Supreme Court review. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: December 27, 2007

Respectfully submitted,

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Comparison of Hickey's Two Opening Briefs

First Appeal U.S.C.A. No. 00-16435	Second Appeal U.S.C.A. No. 17238
Issues Presented	
Issue 1 Whether the district court erred in entering a default judgment on the first amended complaint where the only sought and granted clerk's default was on the second amended complaint, a complaint the district court ruled was invalid as having been improperly filed?	*Issue 1* ***Whether the district court erred in*** denying Mr. Hickey's motion to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), ***on the first amended complaint where the only sought and granted clerk's default was on the second amended complaint, a complaint the district court filed was invalid as neither having been improperly filed*** nor properly served?
Issue 2 Whether the district court erred in entering a default judgment on the first amended complaint that had been served more than 10 months after it had been filed, in violation of Fed. R. Civ. P. 4(m), and where plaintiffs had obtained no extension of the requirement that the complaint be served within 120 days?	*Issue 3 (the order of issues 2 and 3 is reversed in the second brief)* ***Whether the district court erred in*** denying Mr. Hickey's motion to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), on the first amended complaint ***that had been served more than 10 months after it had been filed, in violation of Fed. R. Civ. P. 4(m), and where plaintiffs had obtained no extension of the requirement that he complaint be served within 120 days?***

App. 1

Identical wording appears in ***BOLD ITALICS***

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Issue 3 Whether the district court erred in entering a default judgment on the first amended complaint where plaintiffs motion for default judgment was a motion for default judgment on the non-filed second amended complaint, there was no notice to Mr. Hickey, who had appeared through counsel, that default judgment was sought on the first amended complaint, and the district court itself advised the parties in advance of its final opinion and order that it believed judgment of default would be entered, if at all, on the second amended complaint.	*Issue 2* ***Whether the district court erred in*** denying Mr. Hickey's motion to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), ***on the fist amended complaint where plaintiffs motion for default judgment was a motion for default judgment on the non-filed*** and improperly served ***second amended complaint, there was no notice to Mr. Hickey, who had appeared through counsel, that default judgment was sought on the first amended complaint, and the district court itself advised the parties in advance of its final opinion and order that it believed judgment of default would be entered, if at all, on the second amended complaint?***
Issue 4 Whether the district court erred in (a) striking Mr. Hickey's answer to the first amended complaint where plaintiffs had not obtained an entry of clerk's default as to Mr. Hickey on the first amended complaint prior to his filing of the answer; and (b) subsequently entering judgment of default on the first amended complaint where a valid answer had been filed?	*Issue 4* ***Whether the district court erred in (a) striking Mr. Hickey's answer to the first amended complaint where plaintiffs had not obtained an entry of clerk's default as to Mr. Hickey on the first amended complaint prior to his filing of the answer; and (b) subsequently*** failing to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), ***on the first amended complaint where a valid answer had been filed?***

App. 2

Identical wording appears in ***BOLD ITALICS***

Statement of the Case

The statement of the case at page 2-21 line 3 of the 08/08/01 Opening Brief **are the same** as the statement of the case at page 3-24 line 6 of the 08/04/06 Opening brief, **except for** the following differences:

1) Page 3 (A)(3) line 2 contains "Fed R. Civ. P. 55"	1) Page 3 (A)(3) line 2 contains "Fed. R. Civ. P. 60(b)"
2) Page 3 (A)(4) line 2 states "June 29, 2001"	2) Page 3 (A)(4) line 2 states "October 2, 2001"
3) Page 3 (A)(4) line 3 states "July 27, 2001" and "60 day limit."	3) Page 3 (A)(4) line 3 states "October 31, 2001" and "30 day limit." *Note: the footnote remains identical despite the different dates*
4) Page 12 (B)(A)(5) states "The Reassignment of the Case"	4) Page 13 (B)(A)(5) adds "The granting of a Default Judgment
5) N/A	5) Page 17-18 contains new paragraph that is merely a repeat of information already presented. No new material.
6) N/A	6) Page 18, ¶2 has added sentence with no new material.
7) N/A	7) Page 18 ¶3 contains 2 sentences regarding Second Amended Complaint
8) Page 17 ¶3 contains "See infra at 28-9"	8) "See infra at 28-9" has been deleted from ¶2 page 19 *Note: same material*
9) Page 18 ¶2	9) Page 20 ¶1 contains same info as Page 18 ¶2 except last sentence has been put in bold.
10) Page 18, last line of last paragraph states, "Mr. Hickey timely appealed the judgment"	10) Page 20 last line of last paragraph states "Mr. Hickey appealed the judgment and was affirmed in an unpublished opinion [ER 18]."
11) N/A	11) Page 21 has new "Rule 60(b) Motion"
12) Page 20	12) Page 22-23 have the same two paragraphs that are on page 20 of the 08/08/01 appeal, except their order is reversed.
13) Page 21	13) On page 23-4 a final paragraph has been added regarding the Rule 60(b) motions.

App. 3

Identical wording appears in ***BOLD ITALICS***

Argument	
The arguments presented at pages 21-30 of the 08/08/01 Opening Brief **are the same** as the arguments presented at pages 24-37 of the 08/04/06 Opening brief, **except for** the following differences:	
1) Page 21	1) Page 21 (A) contains a new part that states "...under Fed. R. Civ. P. 60(b) is reviewed for an abuse of discretion. *TCI Group Life Ins. Plans v. Knoebber*, 244 F. 3d 691, 696 (9th Cir. 2001)"
2) Page 21 (A)(B) states "Plaintiffs failed to seek and obtain and entry of default for the first amended complaint."	2) Page 24 (A)(B) states "The Default Judgment is void under Fed. R. CIv. P. 60(b)(3); the second amended complaint was never filed; the plaintiff's sought clerk's default on the second amended complaint; the plaintiff's sought default judgment on the second amended complaint; the court entered default judgment on the first amended complaint."
3) Page 21, first ¶ of (A)(B) is replaced	3) Page 24, two new paragraphs replaces the one that was removed.
4) Page 22 ¶4 opens with "First, the lower court is wrong as a factual matter because plaintiffs requested entry of default specifically on the SAC" and has footnote that states "While the declaration does mention the original complaint, see Lawrence Decl. at para. 4, the district court entered a default judgment against Mr. Hickey based on the FAC, not the original complaint. Moreover, the declaration does not set forth when Mr. Hickey was required to respond to the original complaint or that he failed to timely respond."	4) Page 24 ¶2 has sentence removed along with footnote.
5) Page 23 ¶1 opens with "Second, the district court was wrong because..."	5) Page 26 replaces it with "The district court erred."
6) N/A	6) Page 27-9 contains new heading titled "Plaintiffs and the District court failed to provide any notice as required by Fed. R. Civ. P. 55(b)(2) that they moved for default on the first amended complaint" and

App. 4

Identical wording appears in ***BOLD ITALICS***

	corresponding material.
7) Page 32 ¶3 contains typo "Mr. Hickey Mr. Hickey"	7) Page 32 contains <u>THE EXACT SAME TYPO</u>
8) Page 26	8) Page 33 contains extra paragraph that reads "Plaintiffs' violation of Fed. R. Civ. P. 4(m) resulted in invalid service, and a void default judgment under Fed. R. Civ. P. 60(b)(3). See *TGI Group Life Insurance Plan v. Knoebbler*, 244 F3d 691 (9th Cir. 2001)"
9) Page 26 contains footnote "Plaintiffs did not even first raise the subject of difficulties in serving Mr. Hickey until after the 120-day period had expired. See *Bascomb v. Owers' Ass'n of estate of Questa Verde Townhouses*, 149 F.R.D. 517, 518 (D. Virgin Islands 1992) (plaintiff did not timely move for an extension of time limit)."	9) Page 33 does not contain the footnote.

App. 5

Identical wording appears in ***BOLD ITALICS***